Court, U. S.
FILED
JUL 28 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
APPELLANT,

v.

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC.,
and SECOND OCEANIC CORPORATION,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE AMICUS CURIAE, THE COMMONWEALTH OF MASSACHUSETTS, SUPPORTING THE APPELLANT ON THE MERITS

FRANCIS X. BELLOTTI
Attorney General
TERENCE P. O'MALLEY
Assistant Attorney General
HOWARD WHITEHEAD
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1014

Blanchard Press, Inc., Boston, Mass. — Law Printers

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Interest of the Commonwealth of Massachusetts

The Commonwealth of Massachusetts currently has in force several statutes which, like the Virginia statutes here at issue, impose restrictions upon nonresidents and resident noncitizens relative to fishing in the State's territorial

waters.[1] A decision in this case will have a substantial *stare decisis* effect on present and future cases challenging the validity of such statutes.[2]

Accordingly, in addition to the arguments advanced by the appellant and various other *amici curiae* in support of the appellant, Massachusetts sets forth the following points.

Argument

I. The Enactment of 16 U.S.C. § 1081 (1974) Has Not Preempted the Power of Virginia To Impose the Residency and Citizenship Requirements Contained in Va. Code §§28.1-60 and 28.1-81.1 (1950).

An exercise of federal power preempts an exercise of state power only when the former is necessarily inconsistent with the latter. *See, e.g., Skiriotes* v. *Florida,* 313 U.S. 69, 75 (1941). No such inconsistency exists between the provisions of 16 U.S.C. § 1081 (1974) and the residency and citizenship requirements contained in Va. Code §§28.1-60 and 28.1-81.1 (1950).

The provisions of 16 U.S.C. § 1081 (1974) address only the rights of foreign vessels. They are completely silent relative to the rights of domestic vessels. With respect to

[1] Specifically, such statutes are Mass. Gen. Laws Ann. ch. 130, §§38 and 55 (1976); Act of February 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended* by Act of March 13, 1962, Ch. 219, [1962] Mass. Acts and Resolves 107; and Act of March 23, 1936, Ch. 158, [1936] Mass. Acts and Resolves 153.

[2] It should be noted that, on March 12, 1976, the Supreme Judicial Court of Massachusetts rendered a decision to the effect that the restrictions imposed on nonresidents by the Act of Feb. 20, 1923, Ch. 35, [1923] Mass. Acts and Resolves 17, *as amended by* the Act of March 13, 1962, Ch. 219 [1962] Mass. Acts and Resolves 107, are violative of the Privileges and Immunities Clause of U.S. Const. Art. IV, §2(1). *Commonwealth* v. *Westcott,* Mass. Adv. Sh. (1976) 696. On June 7, 1976, the Attorney General of Massachusetts filed with this Court a petition for a writ of certiorari relative to such decision. *Massachusetts* v. *Westcott* (U.S.S.C. No. 1775), which petition remains pending before the Court.

foreign vessels, the statute generally excludes said vessels from fishing in United States waters. To the extent that said vessels are permitted to fish in United States waters, the permission is contingent upon the "concurrence" of the States "directly affected." Under such circumstances, 16 U.S.C. § 1081 (1974) can hardly be said to conflict with, and thereby preempt, the operation of Virginia's residency and citizenship requirements.

There is a second reason why 16 U.S.C. § 1081 (1974) should not be construed as preempting Virginia's residency and citizenship requirements. The right to determine who may or may not take fish is a right derived from ownership. *See McCready* v. *Virginia,* 94 U.S. 391, 395-396 (1877). *See also, Geer* v. *Connecticut,* 161 U.S. 519, 523-534 (1896). In that regard, Congress has, through the passage of the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1970), expressly established that the ownership of fish found within three miles of each State's coastline lies exclusively in that State. It has thereby also established that each State possesses the exclusive power, subject to relevant constitutional requirements, to determine who may and who may not take such fish.[3] Thus, to construe 16 U.S.C. § 1081 (1974) as superseding an exercise of that power would effect an implied repeal of the Submerged Lands Act. Because of this Court's traditional hostility to the doctrine of implied repeal, that construction should be rejected. *See Morton* v. *Mancari,* 417 U.S. 535, 550-551 (1974).

Accordingly, it is plain that 16 U.S.C. § 1081 (1974) has not preempted Virginia's attempt, through Va. Code §§28.1-60 and 28.1-81.1 (1950), to restrict the right of nonresidents and resident noncitizens to fish in its waters.

[3] Although Congress expressly retained the power to regulate commerce, navigation, national defense and international affairs within State territorial waters, said power does not, by itself, include the right to determine who may and who may not take fish. *See The Abby Dodge,* 223 U.S. 166, 174 (1912); *McCready, supra.*

II. Neither the Residency Requirement of Va. Code §28.1-60 (1950) nor the Citizenship Requirement of Va. Code §28.1-81.1 (1950) Violates the Equal Protection Clause.

Distinctions drawn by a State in the course of economic regulation comport with the requirements of the Equal Protection Clause so long as they are rationally related to a legitimate State purpose. *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949). Both the distinction drawn by Va. Code §28.1-60 (1950), between residents and non-residents, and that drawn by Va. Code §28.1-81.1 (1950), between citizens and non-citizens, meet the standard of constitutionality.

By virtue of the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1970), the citizens of each State, in their collective sovereignty, possess exclusive ownership rights in all of the fish found within the territorial waters of that State.[4] Non-residents and aliens, not being citizens of the State, possess no such ownership rights. Thus, in withholding the right to take fish from those who are non-residents or resident non-citizens, Va. Code §§28.1-60 and 28.1-81.1 (1950) further the purpose of preserving an important natural resource for the exclusive use of those who own the resource. The furtherance of such a purpose on the part of the State is clearly within its police power.[5]

[4] Prior to passage of the Act, this Court had held that the States possessed no common law rights of ownership in fish found in the marginal sea. *Toomer* v. *Witsell*, 334 U.S. 385, 395-402 (1948).

[5] While language in *Takahashi* v. *Fish and Game Comm'n*, 334 U.S. 410 (1948) may suggest that a distinction drawn between citizens and resident non-citizens relative to the right to take fish is violative of the Equal Protection Clause, the distinction actually presented in that case was one between non-citizens of a particular nationality and all other non-citizens. Thus, the Court's discussion of the broader distinction was unnecessary. For that reason, and in light of the precedent in favor of a contrary view, *Takahashi* should not be deemed controlling in this case.

Geer, supra at 534-535. *See also Commonwealth* v. *Westcott*, Mass. Adv. Sh. (1976) 696, 715 (Reardon, J., dissenting).

Accordingly, neither the residency requirement of Va. Code §28.1-60 (1950) nor the citizenship requirement of Va. Code §28.1-81.1 (1950) is violative of the Equal Protection Clause.

Conclusion

Massachusetts urges that the decision of the United States District Court for the Eastern District of Virginia be reversed.

Respectfully submitted,

Francis X. Bellotti
Attorney General
Terence P. O'Malley
Assistant Attorney General
Howard Whitehead
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1014

Dated: July 26, 1976